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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHANIE SILVERIO,	:	
Plaintiff,	:	Civil Action No. 13 Civ 5002(AT)
v.	:	
LQ 511 CORP., LATIN QUARTER NY, INC., and GENARO JIMENEZ, Individually,	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION OF PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

I. STATEMENT OF FACTS

The facts as alleged by Plaintiff in her motion papers are wholly inapposite to Defendants LQ 511 CORP. and LATIN QUARTER NY, INC.'s (hereinafter "Defendants LQ") factual assertions which are summarized below.

On or about July 18, 2013, Plaintiff initiated this action by filing a Summons and Complaint with the court alleging sexual harassment, discrimination, and unlawful retaliation as against Defendants LQ and Defendant Genaro Jimenez ("Defendant Jimenez"). Defendant Jimenez is/was doing business as "Cache Productions" ("Cache Productions"), a nightclub promotion business whose purpose is to increase business and traffic at nightclubs and other similar venues. Medenica Declaration dated December 13, 2013, ¶4. Cache Productions is a New York sole proprietorship owned by Defendant Jimenez. Id.

Around December 2011, LQ and Jimenez entered into an agreement whereby Jimenez and Cache Productions agreed to provide nightclub promotion services to LQ, a nightclub operated by Defendant LQ 511, CORP., in order to increase business and traffic at LQ. Id., ¶5. As part of such agreement, LQ and Jimenez/Cache Productions agreed that Jimenez/Cache Productions would be compensated for their services by retaining the cover charge proceeds generated by LQ at the door as a result of Jimenez/Cache Productions' club promotion services. Id., ¶6.

As part of such agreement, Jimenez requested that he bring his own additional staff to LQ to cater to the resulting increase in business. Id., ¶6. Jimenez and Defendants LQ agreed that Jimenez/Cache Productions would have sole responsibility for this staff and that such staff would be compensated by Jimenez from cover charge revenues generated by Cache Production at LQ. Id., ¶8.

Defendant Jimenez therefore brought a number of staff members, including Plaintiff, to assist Jimenez/Cache Productions at LQ. Id., ¶9. It was understood between Defendants LQ and Defendant Jimenez that Jimenez was an independent contractor providing nightclub promotion services and was not an employee of Defendants LQ. Id. As a result of such agreement, LQ compensated Jimenez/Cache Productions by turning over the cover charge proceeds to Defendant Jimenez. Id., ¶10.

Under the terms of the agreement entered into between Jimenez/Cache Production and LQ, Jimenez had no express or implied authority to represent himself as an employee of LQ, and certainly no express or implied authority to describe himself as holding the managerial position of CEO/Manager of LQ. Id., ¶11.

I. ARGUMENT

A. The Court Should Deny Plaintiff's Motion to Amend the Complaint Because Defendant Jimenez is a Necessary Party to this Proceeding

1) Legal Standard

Although Federal Rule of Civil Procedure 15(a) provides that a court should freely give leave to amend a pleading, this flexible standard does not apply at the expense of competing substantive and procedural considerations. Federal Rule of Civil Procedure 21 allows a court to drop a nondiverse party at any time to preserve diversity jurisdiction, *provided* the nondiverse party is not "indispensable" under Rule 19(b). See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989); Curley v. Brignoli, Curley & Roberts Assocs., 915 F.2d 81, 89 (2d Cir. 1990). Rule 19(b) specifies four factors: (1) whether a judgment rendered in a person's absence might prejudice that person or parties to the action, (2) the extent to which any prejudice could be alleviated, (3) whether a judgment in the person's absence would be adequate, and (4) whether the plaintiff would have an adequate remedy if the court dismissed the suit. See Fed. R. Civ. P. 19(b).

2) Removing Defendant Jimenez from this Action Would Result in Substantial Prejudice to Both Defendants LQ and Defendant Jimenez

Plaintiff argues that her motion should be granted because (1) there has been no undue delay, bad faith or dilatory motive, (2) "Defendants" (presumably Defendants LQ, only) would not suffer any prejudice because "the Second Amended Complaint will not include any new facts that are not already known to Defendants," (3) the amendment would not result in delay in the final disposition of the action, and (4) Defendant Jimenez is not a necessary party because Plaintiff alleges that she was an employee of Defendants LQ exclusively. See generally Memorandum of Law in Support of Plaintiff's Motion for Leave to File a Second Amended Complaint, dated November 27, 2013.

As an initial matter, and with all due respect to Plaintiff, Plaintiff's allegations are at this point unsubstantiated allegations directly controverted by Defendants LQ. Contrary to Plaintiff's allegations that she was an employee of Defendants LQ, Defendants LQ have clearly stated in their Verified Answer that Plaintiff was an employee of Defendant Jimenez and worked exclusively for Defendant Jimenez's company Cache Productions. It is therefore wholly premature for Plaintiff to claim that she has established the parameters of her alleged employment relationship with Defendants LQ, or lack thereof with respect to Defendant Jimenez.

Most importantly, Plaintiff's motion papers fail to address the legal standards of Rule 19(b) with respect to necessary parties. While Rule 15 does permit the amendment of a pleading, and Rule 21 does allow a court to drop a nondiverse party, such amendments cannot be made if the nondiverse party is indispensable under Rule 19(b). See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989); Curley v. Brignoli, Curley & Roberts Assocs., 915 F.2d 81 (2d Cir. 1990). Here, Defendant Jimenez, as alleged perpetrator of the sexual harassment, is an indispensable party because (1) both Defendants LQ and Defendant Jimenez would be prejudiced by Defendant Jimenez's absence from this action; (2) prejudice to Defendants cannot be alleviated given the disparity in factual allegations between the parties; (3) judgment in Defendant Jimenez's absence would be inadequate as to all parties involved in this action; and (4) Plaintiff has an adequate remedy in state court.

(i) Both Defendants LQ and Defendant Jimenez would be prejudiced by Defendant Jimenez's absence from this Action

Although Defendants LQ have every intention, and will, fully substantiate the allegations made in their Verified Answer, there is substantial risk to Defendants LQ that Defendant Jimenez's absence would severely prejudice Defendants LQ. Defendants LQ have an interest in avoiding multiple litigations, or inconsistent relief, or sole responsibility for an alleged liability Defendants LQ may be held to share with Defendant Jimenez. Furthermore, Defendants LQ may be subject to multiple litigations if Plaintiff is unable to recover against Defendants LQ in this action and then sues Defendant Jimenez in another action. Defendant Jimenez may then assert a claim against Defendants LQ for liability Defendant Jimenez may claim it shares with Defendants LQ.

With respect to potential prejudice as against Defendant Jimenez, as a practical matter, any judgment in this action reached in his absence would have no *res judicata* effect as against Defendant Jimenez. Defendants LQ could, however, preclude Defendant Jimenez, to a certain extent, from litigating certain issues against them by asserting the defense of collateral estoppel. It simply cannot be assumed given the factual allegations made here by Plaintiff and Defendants LQ that either party will protect Defendant Jimenez's interests adequately. Accordingly, Defendant Jimenez might be prejudiced if he were not given the opportunity to set forth his point of view on issues in dispute. See generally H&H Int'l Corp. v. J. Pellechia Trucking, Inc., 119 F.R.D. 352 (S.D.NY. 1988) (Dismissal for failure to join indispensable party is granted where, if indispensable party were joined, diversity jurisdiction would be defeated, and thus subject matter jurisdiction can no longer be asserted).

(ii) Prejudice Cannot be Alleviated Given the Disparity in Factual Allegations Between the Parties

In this instance, the parties are assigning vastly different interests to the absentee. Defendants LQ claim that Defendant Jimenez is an independent contractor who brought his own employees, whereas Plaintiff is claiming he was a high ranking employee of LQ. Furthermore, Plaintiff is solely imputing the alleged act of sexual harassment to Defendant Jimenez, the absentee party. In other words, were it not for Defendant Jimenez's acts as alleged by Plaintiff, there would be no cause of action to speak of. Accordingly, shaping relief so as to protect all the interests involved in the absence of Defendant Jimenez is practically impossible.

(iii) Judgment in Defendant Jimenez's absence Would be Inadequate as to all Parties Involved

As to the third Rule 19(b) factor, a judgment in Defendant Jimenez's absence would be clearly inadequate. "[A]dequacy refers to the 'public stake in settling disputes by wholes, whenever possible." Republic of Philippines v. Pimentel, 128 S. Ct. 2180, 2193 (quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)). Accordingly, this factor concerns the "'social interest in the efficient administration of justice and the avoidance of multiple litigation.'" Id. (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 738, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)). As stated above, piecemeal litigation is highly probable in the absence of Defendant Jimenez in this action. In contrast, it would be far more efficient to bring the case to final judgment in state court at this juncture, rather than to have the parties relitigate the same facts in state court upon the conclusion of this action.

(iv) Plaintiff has an Adequate Remedy in State Court

Perhaps most importantly, Plaintiff has a remedy in state court. There is no evidence that Plaintiff cannot bring the same matter in the courts of New York State. Defendants LQ are New York entities and therefore are clearly amenable to state court jurisdiction. Although Defendant Jimenez appears to be a resident of New Jersey, he has done substantial business in the state of New York either individually, or through his company "Cache Productions." In other words, he has sought out and engaged in business in New York State on numerous occasions. Therefore, it can be inferred that Defendant Jimenez is doing business in this jurisdiction and is thus subject to suit here.

Finally, as Plaintiff correctly points out, the parties are very early in the litigation process. Plaintiff would therefore suffer little prejudice in having to re-file the same action in State court as against Defendants LQ and Defendant Jimenez. There is no substantive or procedural impediment for Plaintiff to do so aside from a slight inconvenience.

In sum, the questions to be resolved in this action are so entangled with the question of the authority and actions of Defendant Jimenez that adequate and just relief cannot be granted in his absence. See H&H Int'l Corp. v. J. Pellechia Trucking, Inc., 119 F.R.D. 352 (S.D.NY. 1988); see also Felix Cinematografica v. Penthouse International, Ltd., 99 F.R.D. 167, 171 (SDNY 1983).

B. Plaintiff's Late Filing of an EEOC Proceeding Further Underscores that this Action is Premature

Plaintiff further argues that this Court should stay this action pending receipt of Plaintiff's right to sue letter from the EEOC. As an initial matter, Plaintiff's argument further underscores the fact that this federal action is entirely premature and unnecessary. It is at this point unclear why Plaintiff chose to file an EEOC proceeding as such late juncture. However, the fact that she did so as a tactical maneuver to maintain federal court jurisdiction simply does not make sense.

There is absolutely no guarantee to Plaintiff that she will obtain a right-to-sue letter in order to bring Title VII claims against Defendants LQ. But even if she did, it would still not moot the point of Defendant Jimenez as a necessary party. The principles of Rule 19 operate independently of diversity jurisdiction principles, and are therefore applicable here even if Plaintiff had brought Title VII claims from the inception of this action.

But perhaps most importantly, the late filing of Title VII claims plainly highlights the fact that this action should be dismissed without prejudice to Plaintiff. It may take up to six months for Plaintiff to find out whether she has a right to sue under Title VII. And even if Plaintiff did add Title VII claims to her complaint as against Defendants LQ only, this Court would still need to deal with the issue of whether Defendant Jimenez is a necessary party to this action. Accordingly, Plaintiff's request to stay the action should similarly be denied.

For all the foregoing reasons, Defendants LQ respectfully submit that Plaintiff's motion to amend the complaint to drop Defendant Jimenez as a party should be denied in its entirety.

[SIGNATURE PAGE TO FOLLOW]

Date: December 13, 2013

Respectfully submitted,

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